

Submitted via Email and FOIA Online

September 27, 2021

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460
(202) 566-1677
hq.foia@epa.gov

Re: FOIA Request for Records Containing or Relating to Communications between Industry and EPA Regarding the October 14, 2020, PFAS Testing Petition under Section 21 of the Toxic Substances Control Act (TSCA)

Dear Freedom of Information Officer:

This request for records is submitted on behalf of the Center for Environmental Health (“CEH”) in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. Part 2, Subpart A. The purpose of the request is to obtain copies of records containing or relating to oral or written communications between EPA and industry parties, including but not limited to The Chemours Company (“Chemours”), DuPont, the American Chemistry Council (“ACC”), and any other industry trade associations, law firms, public relations companies, and lobbyists, regarding the October 14, 2021, petition filed by CEH and other groups under section 21 of TSCA. This petition sought to require Chemours to conduct testing on 54 Per- and Polyfluoroalkyl Substances (PFAS) manufactured at its production facility in Fayetteville, North Carolina.

Records Requested

In accordance with FOIA, please provide us with all records containing or relating to oral or written communications between EPA and industry parties, including but not limited to Chemours, DuPont, ACC, and any other industry trade associations, law firms, public relations companies, and lobbyists, and any representatives, staff, counsel, lobbyists, or agents thereof, regarding the October 14, 2021, petition filed by CEH and other groups under section 21 of TSCA to require Chemours to conduct testing on 54 PFAS manufactured, processed, and/or released into the environment at or from its production facility in Fayetteville, North Carolina.

This request covers all communications from October 14, 2021, to the present, including but not limited to communications relating to EPA’s January 7, 2021, petition denial, petitioners’ March 16, 2021, request to reconsider the petition denial and subsequent EPA review and analysis of issues relating to the petition and request for reconsideration.

In this request, the term “records” means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, notes and minutes of meetings or

telephone conversations, memoranda, emails, text messages, calendar invitations, charts, tables, presentations, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

This request specifically seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by EPA staff if used for any government purpose.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552, we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i). The FOIA request seeks documents relating to a petition filed under section 21 of TSCA, which authorizes members of the public to request issuance of test rules or orders under section 4 of the Act, sets deadlines for EPA to respond to such petitions, requires publication of these responses in the Federal Register and creates a mechanism for judicial review of petition denials. The relief sought under the petition thus involves EPA’s exercise of its regulatory authorities under TSCA.

Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities.

Disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 40 C.F.R. § 2.107(l)(2)(ii), of government operations or activities. The requestor seeks records of communications relating to its TSCA section 21 petition between EPA and industry parties, including Chemours, which would be required to conduct the studies required by EPA under TSCA section 4 if the Agency were to grant the petition. These communications are not now a matter of public record. Disclosure of records reflecting information regarding the petition received from Chemours and other industry parties and EPA’s interactions with these parties will shed light on EPA’s review of the petition and request for

reconsideration and in turn will contribute to public oversight of how EPA has responded and will respond to the petition.

Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in EPA's Actions on PFAS Chemicals

Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” the outcome of EPA’s review of the section 21 petition and request for reconsideration and in EPA’s broad approach to reducing the risks of the PFAS class of substances under TSCA and other laws.

CEH is a non-profit organization based in Oakland, California, whose mission is to improve public health and well-being through research, analysis, public education, and advocacy. Its work has been focused on issues of chemical safety. It has used a variety of channels to improve public understanding of the health and environmental risks of chemicals of concern, reduce their presence in consumer products, eliminate unsafe manufacturing practices, and strengthen enforcement and implementation of federal and state laws and regulations that protect the public from unsafe chemicals. Its activities include research, education, outreach, collaborative work with businesses, partnerships with other stakeholders, advocacy before Congress and state and federal agencies like EPA, and litigation to enforce state and federal environmental laws.¹

Along with the other five North Carolina groups filing the section 21 petition, CEH has closely followed and commented on EPA initiatives and actions relating to PFAS, a class of chemicals of broad public concern that has received extensive attention from Congress, States, EPA, and the media. As a co-author of the petition and frequent submitter of comments to EPA and other governmental bodies, CEH also has extensive expertise and knowledge relating to the risks of PFAS in general and the impacts of the Chemours facility on the health of North Carolina residents in particular.²

The section 21 petition has received broad coverage in various publications, and CEH and its co-petitioners have played an active role in assuring that the media, national, state, and grassroots organizations, and concerned members of the public are fully informed about all petition-related developments. Information obtained in response to this FOIA request will inform both CEH’s ongoing efforts to provide updates on the petition to a broad audience in the media and public and its continuing discussions with EPA about the petition and request for reconsideration.

CEH has the ability and intention to disseminate the information obtained in response to this FOIA request to its co-petitioners, supporters, and partners and to the broader public. CEH can publicize the information received under FOIA through press releases and blogs on its website and through social media. CEH’s communications staff can also disseminate newsworthy

¹ Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,” in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

² Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

information obtained from this request to the media. CEH maintains an email list of 25,000 supporters who regularly receive information and action alerts. On CEH's website, CEH maintains links to a list of CEH press releases, blog posts, and news articles about CEH's actions and references to CEH in the news media. CEH also maintains a regular social media presence with posts to Facebook and Twitter.

Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.

The public's understanding of government operations or activities by EPA to address PFAS "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Records of EPA communications with industry parties, including Chemours, DuPont, and ACC, and information exchanged by EPA with the two companies and their trade association will contribute significantly to public understanding of the basis for EPA actions on the petition and its approach to PFAS generally. No other publicly available information will perform this function.

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. CEH is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). Its sole interest in obtaining the requested information is to facilitate effective and meaningful public understanding of EPA's decisions on the petition and request for reconsideration and the risks of PFAS generally.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify and inform us of the basis for your decision.

Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, CEH will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. CEH reserves its rights to seek administrative or judicial review of any fee waiver denial.

Instructions For Record Delivery

Per FOIA and EPA regulations, we expect a reply within twenty working days, see 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply "must...indicate within the relevant time period the scope of documents [EPA] will produce." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please also produce the records on a rolling basis; at no point should EPA's search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below.

If you would like to discuss the scope of this request or other matters, please contact Tom Fox, Senior Policy Advisor, CEH, at tom@ceh.org. Thank you for your assistance.

Respectfully submitted,

/s/

Thomas R. Fox
Senior Policy Advisor
Center for Environmental Health
tom@ceh.org
703-832-2233